ORIGINAL

MEDIA ACCESS PROJECT

September 1, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., NW
Washington DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ex parte* presentation in MM Docket 93-25

Dear Ms. Salas:

On August 31, 1998, Cheryl A. Leanza, Gigi B. Sohn, and Sabrina Youdim of Media Access Project met with Anita Wallgren and Wendy Creeden of Commissioner Ness's office on behalf of DAETC *et al.* to discuss the Commission's implementation of Section 25 of the 1992 Cable Act.

Ms. Sohn and Ms. Leanza discussed the meaning of "editorial control" as it appears in Section 25(b) of the Act. Ms. Sohn and Ms. Leanza stated that the Commission had previously interpreted this phrase in its proceeding implementing the leased access provisions of the 1992 Cable Act. Ms. Sohn and Ms. Leanza provided copies of the relevant portion of that decision, a copy of which is attached. *1992 Cable Act Implementation, Second Report and Order*, 12 FCC Rcd 5267 at 5316-18 (1997). In this decision, the Commission determined that, so long as there is sufficient capacity, a cable provider must accommodate all programmers seeking space on leased access channels. If sufficient capacity is not available, the Commission concluded that the cable operator was limited to using "objective, content neutral" criteria to select among programmers. Finally, Ms. Sohn and Ms. Leanza discussed the possibility of allowing DBS providers several options, in addition to the leased access model, to comply with the prohibition on the exercise of editorial control, including allowing them to create an industry-wide consortium or individual arms-length non-profit corporations that will select programming and programmers. Ms. Sohn and Ms. Leanza indicated they would provide further information regarding this proposal in the near future.

An original and three copies of this letter are being filed with your office today.

Sincerely,

Cheryl A. Leanza
Staff Attorney

Attachment
cc: Anita Wallgren
Wendy Creeden

rec'd 0+3

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	CS Docket No. 96-60
and Competition Act of 1992:	)	
	)	
	)	
Leased Commercial Access	)	

SECOND REPORT AND ORDER AND SECOND ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Adopted: January 31, 1997 **Released: February 4, 1997**

By the Commission:

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H. Selection of Leased Access Programmers

1. Background

98. In the *Further Notice*, the Commission proposed rules to govern a cable operator's selection of leased access programmers.[254] We tentatively concluded that an operator should be required to select leased access programmers on a first-come, first-served basis as long as the operator's available leased access capacity is sufficient to accommodate all incoming requests.[255] We sought comment on whether an operator should be allowed to accept leased access programmers on any other basis if its system's available leased access capacity is insufficient to accommodate all pending requests.[256] Specifically, we noted that where demand for leased access channels exceeds the available supply, it may be appropriate to allow an operator to make content-neutral selections in order to avoid situations that could "adversely affect the operation, financial condition, or market development of the cable system."[257] We asked whether it would be appropriate, when two or more leased access programmers simultaneously demand the last available leased access space, to allow the cable operator to select a leased access programmer based on the amount of time requested (e.g., a full-time request versus a part-time request).[258] We also sought comment on whether operators should be permitted to base their selections on any content-neutral criteria other than the amount of time requested by the programmers.[259]

2. Discussion

99. We conclude that, so long as an operator's available leased access capacity is sufficient to satisfy the current demand for leased access, all leased access requests must be accommodated as expeditiously as possible, unless the operator refuses to transmit the programming because it contains obscenity or indecency.[260] We believe that such an approach is the most appropriate method of assuring that cable operators comply with Section 612(c)(2),

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[254] *Further Notice* at paras. 127-29.

[255] *Id.* at para. 128.

[256] *Id.*

[257] *Id.* (quoting Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1)).

[258] *Id.* at para. 129.

[259] *Id.*

[260] *See* Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

which explicitly restricts operators' exercise of editorial control over leased access programming.[261] Section 612(c)(2) provides that "a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming," except in the case of programming containing obscenity or indecency, or to the minimum extent necessary to set a reasonable price.[262] We believe that requiring operators to accommodate all leased access requests when the programming does not contain obscenity or indecency, so long as there is available capacity, will most effectively restrict operators' exercise of editorial control, without impinging upon their discretion with regard to price and sexually-oriented programming. We also believe that such an approach will further the statutory objective to promote competition because it will reduce an operator's ability to select leased access programming based on anti-competitive motives.

100. We believe, however, that an operator should be allowed to make objective, content-neutral selections from among leased access programmers when the operator's available leased access channel capacity is insufficient to accommodate all pending leased access requests.[263] In the full-time channel context, this situation would arise if two or more leased access programmers requested the remaining available leased access space; in the part-time context, this situation could arise, for example, if two or more programmers requested the 8:00 p.m. to 9:00 p.m. time slot on the system's part-time leased access channel. In such situations, we believe that the cable operator should be allowed to make an objective, content-neutral selection among the competing programmers. For example, the operator could hold a lottery.[264] Or, the operator could base its decision on other objective, content-neutral criteria such as a programmer's non-profit status,[265] the amount of time a programmer is willing to lease,[266] or a programmer's willingness to pay the highest reasonable price for the capacity at issue.[267]

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[261] *Id.* The record reflects that many commenters are in favor of controlling an operator's selection of leased access programming through some variation of a first-come, first-served approach. *See* Asiavision Comments at 1; CME, et al. Comments at 25; Game Show Network Comments at 23-26; Intermedia/Armstrong Comments at 13-14; Telemiami Comments at 22; ValueVision Comments at 13-14; Viacom Comments at 13. *But see* NCTA Comments at 31-32; Outdoor Life, et al. Comments at 37; TCI Comments at 36-37; Daniels, et al. Reply at 10.

[262] Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

[263] *Further Notice* at para. 128.

[264] *See* Visual Media Comments at 7; CME, et al. Comments at 25.

[265] *See, e.g.*, CME, et al. Comments at 25-26.

[266] Several commenters support a preference for full-time programmers or programmers requesting the greatest total usage of channel capacity. *See* A&E, et al. Comments at 59-60; Lorilei Comments at 15; Outdoor Life, et al. Comments at 37.

[267] *But see* Viacom Comments at 13.

Allowing flexibility within this limited context will better enable operators to assure the growth and development of their cable systems.[268]

I. Procedures for Resolution of Disputes

1. Background

101. In the *Further Notice*, the Commission proposed to streamline its complaint process by establishing a rule that a leased access programmer may not file a complaint alleging that a leased access rate is unreasonable until an independent accountant has reviewed the cable operator's calculations and made a determination of the maximum rate.[269] We proposed to allow the operator to select the independent accountant when the parties cannot agree on a mutually acceptable accountant.[270] Our proposal required the accountant's review to be conducted within 60 days of the leased access programmer's request to the operator for a review.[271]

102. The Commission solicited comment on whether, in the absence of any evidence to the contrary, a determination by the accountant that the cable operator's rate exceeds the permissible rate should satisfy the complainant's burden to rebut, with clear and convincing evidence, the statutory presumption that an operator's rates are reasonable.[272] In addition, we tentatively concluded that the accountant's final report should be filed in the cable system's local public file in order to provide notice to other potential leased access programmers.[273] We asked whether, in the alternative, we should require operators to provide the accountant's final report to other leased access programmers upon request.[274] We sought comment on what type of information should be included in the accountant's final report and what type of information should remain confidential.[275] We also asked whether the responsibility for paying the accountant's expenses should be shared equally by both parties or borne only by the party proven

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[268] *See* Daniels, et al. Comments at 23; NCTA Comments at 31-32; Outdoor Life, et al. Comments at 37; TCI Comments at 36-37; Time Warner Comments at 18; Travel Channel Comments at 23.

[269] *Further Notice* at para. 137.

[270] *Id.*

[271] *Id.*

[272] *Id. See also* Communications Act § 612(f), 47 U.S.C. § 532(f).

[273] *Further Notice* at para. 138.

[274] *Id.*

[275] *Id.*